

active duty or whose period of active duty was extended under the Act of August 1, 1961, Public Law 87-117 (75 Stat. 242), may be involuntarily ordered to active duty under this Act.

### § 9. Pre-World War II Legislative Restrictions on Military Activity

The German invasion of Poland in September of 1939 and the subsequent declarations of war on Germany by Britain and France intensified the public debate over United States involvement or support for its traditional allies in the conflict.

Shortly after the German invasion, the President by proclamation convened an extraordinary session of Congress to act on neutrality legislation.<sup>(2)</sup> Accepting the President's request,<sup>(3)</sup> Congress repealed provisions of the Neutrality Acts of 1935 and 1937 which prohibited shipments of arms and ammunition to belligerent nations.<sup>(4)</sup>

Congress later authorized the President to provide military sup-

plies to American republics.<sup>(5)</sup> The concept of providing assistance to other nations which originated in the joint resolution making military assistance available to American republics was extended beyond the Western Hemisphere. The Lend-Lease Act authorized the President to direct the manufacture, lease, or loan of military and naval supplies to "the government of any country whose defense the President deems vital to the defense of the United States."<sup>(6)</sup> This act permitted the United States to supply Britain and other nations in their struggle against Germany.

At the request of the President, Congress approved the first peacetime draft in the nation's history, the Selective Service Act of 1940, but prohibited the employment of inducted land forces outside the Western Hemisphere.<sup>(7)</sup> An identical restriction had been imposed a month earlier in a joint resolution authorizing the President to activate reserve and retired military personnel.<sup>(8)</sup> Protecting the Western Hemisphere became sig-

2. See § 12.3, *infra*, for this proclamation.

3. See § 11.6, *infra*, for a discussion of the President's address to a joint session.

4. See § 9.1, *infra*, for the discussion of the Neutrality Act of 1939.

5. See § 9.2, *infra*, for a discussion of this measure. The Neutrality Act of 1939 did not apply to American republics.

6. See § 9.3, *infra*, for a discussion of the Lend-Lease Act.

7. See § 9.5, *infra*, for this restriction.

8. See § 9.4, *infra*, for this resolution.

nificant in actions preceding American involvement in World War II. The President justified his actions as in the interest of Western Hemisphere defense when he acted to acquire British territory in Newfoundland, Bermuda, and certain Caribbean islands for bases in exchange for out-of-date American destroyers,<sup>(9)</sup> and sent American troops to replace British forces in Iceland.<sup>(10)</sup>

Legislation regulating the economy was enacted prior to and during World War II. The Priorities Act of May 31, 1941,<sup>(11)</sup> empowered the President to allocate any material where necessary to facilitate the defense effort. The Second War Powers Act<sup>(12)</sup> extended this authority. These two acts furnished the statutory foundation for the extensive system of consumer rationing administered by the Office of Price Administration, as well as for the comprehensive control of industrial materials and output which was exercised by the

War Production Board.<sup>(13)</sup> Under the Emergency Price Control Act,<sup>(14)</sup> the Office of Price Administration regulated the price of almost all commodities, as well as the rentals for housing accommodations in scores of defense rental areas. The War Labor Disputes Act<sup>(15)</sup> permitted the President to commandeer plants which were closed by strikes. The Renegotiation Act,<sup>(16)</sup> which the Su-

9. See §11.7, *infra*. See also §3.2, *supra*, for an opinion of the Attorney General as to the constitutionality of this action taken without consulting Congress.
10. See §11.8, *infra*, for an announcement of this action.
11. 55 Stat. 236, 77th Cong. 1st Sess. (Pub. L. No. 77-92).
12. 56 Stat. 176, 77th Cong. 2d Sess. (Pub. L. No. 77-507).

13. Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 92-82, 92d Cong. 2d Sess. 337 (1973).
14. 56 Stat. 23, 77th Cong. 2d Sess. (Pub. L. No. 77-421).
15. 57 Stat. 163, 78th Cong. 1st Sess. (Pub. L. No. 78-89).
16. The Supreme Court in *Lichter v United States*, 334 U.S. 742, 745 (1948) stated that the term "the Renegotiation Act" included 56 Stat. 226, 77th Cong. 2d Sess. (Pub. L. No. 77-528), the Sixth Supplemental National Defense Appropriation Act, sometimes called the First Renegotiation Act; 56 Stat. 798, 801, 77th Cong. 2d Sess. (Pub. L. No. 77-753), the Revenue Act of 1942, Title VIII, Renegotiation of War Contracts; 57 Stat. 347, 78th Cong. 1st Sess. (Pub. L. No. 78-108), Military Appropriations Act of 1944; 57 Stat. 564, 78th Cong. 1st Sess. (Pub. L. No. 78-149), an act to prevent payment of excessive fees or compensation in connection with the negotiation of war contracts; 58 Stat. 21, 78-93, 78th Cong. 2d Sess. (Pub. L. No. 78-235), Revenue Act of 1943, Title VII, Re-

preme Court found to be a proper exercise of the war powers by Congress,<sup>(17)</sup> authorized the government to recover excessive profits realized on war contracts.

### ***Neutrality Act***

#### **§ 9.1 The House and Senate agreed to the conference report on the Neutrality Act of 1939.**

On Nov. 3, 1939, the House by a vote of yeas 243, nays 172, not voting 14,<sup>(18)</sup> and the Senate by a vote of yeas 55, nays 24,<sup>(19)</sup> agreed to the conference report (H. Rept. No. 1475) on House Joint Resolution 306, the Neutrality Act of 1939, to preserve the neutrality and peace of the United States and secure the safety of its citizens and their interests.<sup>(20)</sup>

negotiation of War Contracts, and Title VIII, Repricing of War Contracts.

17. *Lichter v United States*, 334 U.S. 742 (1948).

18. 85 CONG. REC. 1389, 76th Cong. 2d Sess. See also pp. 1381–86, for the conference report and statement of the conferees.

19. *Id.* at p. 1356.

20. 22 USC §§ 441, 444, 445, 447–451, 453–457; Pub. Res. No. 54, 54 Stat. 4, Ch. 2, H.J. Res. 306, 76th Cong. 2d Sess., approved Nov. 4, 1939. Neutrality legislation had been ap-

The act, which did not apply to any American republic engaged in war against a non-American state or states, authorized the President to issue a proclamation naming foreign states as belligerents whenever he or the Congress by concurrent resolution found that a state of war existed between foreign states.<sup>(1)</sup> He was also authorized to require a bond from the owner or person in command of any domestic or foreign vessel which he had reason to believe was about to carry out of a port or from the jurisdiction of the United States, fuel, men, arms, ammunition, implements of war, supplies, dispatches, or information to any warship, tender, or supply ship of a belligerent state; and to promulgate rules and regulations.<sup>(2)</sup>

It was further provided that where states and areas are named as being at war in a Presidential proclamation issued pursuant to

proved on Aug. 31, 1935 (Pub. Res. No. 67, 49 Stat. 1081, S.J. Res. 173, 74th Cong. 1st Sess.), and amended on May 1, 1937 (Pub. Res. No. 27, 50 Stat. 121, S.J. Res. 251, 75th Cong. 1st Sess.).

1. See § 12.4, *infra*, for an example of this kind of proclamation.

2. This provision effectuated a request of the President to repeal embargo provisions of earlier Neutrality Acts. See § 11.6, *infra*, for a discussion of the President's message requesting the Neutrality Act of 1939.

authority granted in the act, no American vessels may lawfully carry passengers or articles to such states.<sup>(3)</sup> Similarly, the terms of the act provided that no American citizen or vessel may lawfully proceed into an area designated by the President as a combat zone.<sup>(4)</sup> Moreover, no American citizen may lawfully travel on any vessel of any such state and no American merchant vessel engaged in commerce with any foreign state may lawfully be armed.<sup>(5)</sup> And no person in the United States may lawfully engage in certain financial transactions with any government or any political subdivision of such states or person acting for or on behalf of such governments.<sup>(6)</sup>

3. This provision, §2 of the Neutrality Act of 1939, was repealed by 55 Stat. 764, Ch. 473 §1, 77th Cong. 1st Sess. (Pub. L. No. 77-294), approved on Nov. 17, 1941.

4. This provision, §3 of the Neutrality Act of 1939, was repealed by 55 Stat. 764, Ch. 473 §1, 77th Cong. 1st Sess. (Pub. L. No. 77-294), approved on Nov. 17, 1941.

5. This provision, §6 of the Neutrality Act of 1939, was repealed by 55 Stat. 764, Ch. 473 §2, 77th Cong. 1st Sess. (Pub. L. No. 77-294), approved Nov. 17, 1941.

6. This provision, §7 of the Neutrality Act of 1939, was amended to be inoperative when the United States engages in war. 56 Stat. 95, Ch. 104,

The act also provided that no person within the United States may solicit or receive any contribution for or on behalf of a government, agency, or instrumentality of such states. Whenever the President places special restrictions on the use of ports and territorial waters of the United States, submarines and armed merchant vessels of a foreign state may not enter or depart from those ports or territorial waters.<sup>(7)</sup>

The act also established the National Munitions Control Board.<sup>(8)</sup>

### ***Military Assistance to American Republics***

**§9.2 The Senate and House agreed to a joint resolution authorizing the Secretaries of War and of the Navy to assist the governments of American republics to increase their military and naval establishments.**

On May 28, 1940, the Senate amended and passed,<sup>(9)</sup> and on

77th Cong. 2d Sess. (Pub. L. No. 77-459), approved on Feb. 21, 1942.

7. See §12.5, *infra*, for such restrictions.

8. This provision, §12 of the Neutrality Act of 1939, was repealed by 68 Stat. 861, Ch. 937, title V §542(a) (12), 83d Cong. 2d Sess. (Pub. L. No. 83-665, H.R. 9678), approved on Aug. 26, 1954.

9. 86 CONG. REC. 6977, 76th Cong. 3d Sess.

June 5, 1940, the House agreed to Senate amendments and passed,<sup>(10)</sup> House Joint Resolution 367, authorizing the President in his discretion to direct the Secretary of War to manufacture or otherwise procure coast-defense and antiaircraft materiel, including ammunition therefor, and to direct the Secretary of the Navy to construct vessels of war on behalf of any American republic.<sup>(11)</sup>

### ***Lend-Lease Act***

#### **§ 9.3 The Senate and House agreed to a bill further to promote the defense of the United States, known as the Lend-Lease Act, which authorized the President to direct manufacture, lease, and loan of war supplies to foreign governments.**

On Mar. 8, 1941, the Senate by a vote of yeas 60, nays 31, not voting 4, amended and agreed to,<sup>(12)</sup> and the House by a vote of yeas 317, nays 71, present 1, not voting 40,<sup>(13)</sup> agreed to Senate amend-

ments and passed, H.R. 1776, further to promote the defense of the United States, known as the Lend-Lease Act, which authorized the President to direct manufacture of defense articles for the government of any country whose defense the President deemed vital to the defense of the United States, and to direct the lease or loan of defense articles. The act was approved in the following language:<sup>(14)</sup>

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "An Act to Promote the Defense of the United States".*

Sec. 2. As used in this Act—

(a) The term "defense article" means—

(1) Any weapon, munition, aircraft, vessel, or boat;

(2) Any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this subsection. . . .

Sec. 3. (a) Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—

1941, for initial House approval of this bill by a vote of yeas 260, nays 165, not voting 6.

14. The text is taken from 55 Stat. 31 (Pub. L. No. 77-11), Mar. 11, 1941.

10. *Id.* at p. 7616. See 85 CONG. REC. 9861, 76th Cong. 1st Sess., July 24, 1939, for initial House approval of this joint resolution.

11. Pub. Res. No. 83, 54 Stat. 396 (June 15, 1940).

12. 87 CONG. REC. 2097. 77th Cong. 1st Sess.

13. *Id.* at p. 2178. See 87 CONG. REC. 815, 77th Cong. 1st Sess., Feb. 8,

(1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, or otherwise procure, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for the government of any country whose defense the President deems vital to the defense of the United States.

(2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article, but no defense article not manufactured or procured under paragraph (1) shall in any way be disposed of under this paragraph, except after consultation with the Chief of Staff of the Army or the Chief of Naval Operations of the Navy, or both.  
 . . .<sup>(15)</sup>

(3) To test, inspect, prove, repair, outfit, recondition, or otherwise to place in good working order, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for any such government, or to procure any or all such services by private contract.  
 . . .<sup>(16)</sup>

(c) After June 30, 1943, or after the passage of a concurrent resolution by the two Houses before June 30, 1943, which declares that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States, neither

the President nor the head of any department or agency shall exercise any of the powers conferred by or pursuant to subsection (a); except that until July 1, 1946, any of such powers may be exercised to the extent necessary to carry out a contract or agreement with such a foreign government made before July 1, 1943, or before the passage of such concurrent resolution, whichever is the earlier. . . .<sup>(17)</sup>

Sec. 5. (a) The Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government involved shall, when any such defense article or defense information is exported, immediately inform the department or agency designated by the President to administer section 6 of the Act of July 2, 1940 (54 Stat. 714), of the quantities, character, value, terms of disposition, and destination of the article and information so exported.

(b) The President from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act except such information as he deems incompatible with the public interest to disclose. Reports provided for under this subsection shall be transmitted to the Secretary of the Senate or the Clerk of the House of Representatives, as the case may be, if the Senate or the House of Representatives, as the case may be, is not in session.

Sec. 6. (a) There is hereby authorized to be appropriated from time to

15. See 57 Stat. 2], 25, 78th Cong. 1st Sess. (Pub. L. No. 78-11), for an amendment to this section.

16. See 58 Stat. 222, 223, 78th Cong. 2d Sess. (Pub. L. No. 78-304), for an amendment to this provision.

17. See 59 Stat. 52, 79th Cong. 1st Sess. (Pub. L. No. 79-31); 58 Stat. 222, 223, 78th Cong. 2d Sess. (Pub. L. No. 78-304); and 57 Stat. 20, 78th Cong. 1st Sess. (Pub. L. No. 78-9), for amendments to this provision.

time, out of any money in the Treasury not otherwise appropriated, such amounts as may be necessary to carry out the provisions and accomplish the purposes of this Act.

(b) All money and all property which is converted into money received under section 3 from any government shall, with the approval of the Director of the Budget, revert to the respective appropriation or appropriations out of which funds were expended with respect to the defense article or defense information for which such consideration is received, and shall be available for expenditure for the purpose for which such expended funds were appropriated by law, during the fiscal year in which such funds are received and the ensuing fiscal year; but in no event shall any funds so received be available for expenditure after June 30, 1946. . . .<sup>(18)</sup>

Sec. 11. If any provision of this Act or the application of such provision to any circumstance shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other circumstances shall not be affected thereby.

### ***Reserve Forces Limited to Western Hemisphere***

#### **§ 9.4 The House and Senate agreed to a provision re-**

18. See 61 Stat. 449, 450, 80th Cong. 1st Sess. (Pub. L. No. 80-123), for repeal of this provision which had been amended by 59 Stat. 52, 79th Cong. 1st Sess. (Pub. L. No. 79-31); 58 Stat. 222, 223, 78th Cong. 2d Sess. (Pub. L. No. 78-304); and 57 Stat. 20, 78th Cong. 1st Sess. (Pub. L. No. 78-9).

**stricting employment of reserve components of the United States Army beyond the limits of the Western Hemisphere in a Senate joint resolution authorizing the President to activate the reserves.**

On Aug. 15, 1940,<sup>(19)</sup> the House by a vote of yeas 342, nays 34, not voting 54, agreed to Senate Joint Resolution 286, authorizing the President to order members and units of reserve components and retired personnel of the Regular Army into active military service. The joint resolution, which was passed by the Senate by a vote of yeas 71, nays 7, on Aug. 8, 1940,<sup>(20)</sup> and signed by the President on Aug. 27, 1940, as Public

19. 86 CONG. REC. 10429, 10448, 10449, 76th Cong. 3d Sess. See also 86 CONG. REC. 10763, 76th Cong. 3d Sess., Aug. 22, 1940, for House approval of the conference report.

20. *Id.* at p. 10068. The Senate by a vote of yeas 31, nays 45, rejected a motion to recommit the joint resolution with instructions to report it back forthwith with an amendment substituting "continental United States and Territories and possessions of the United States" in place of the remainder of section 1 beginning with "Western Hemisphere." *Id.* at pp. 10067, 10068. See also 86 CONG. REC. 10791, 76th Cong. 3d Sess., Aug. 23, 1940, for Senate voice vote approval of this measure.

Resolution No. 96,<sup>(1)</sup> contained the following restriction on use of reserves:<sup>(2)</sup>

. . . [T]he members and units of the reserve components of the Army of the United States ordered into active Federal service under this authority shall not be employed beyond the limits of the Western Hemisphere except in the territories and possessions of the United States, including the Philippine Islands.

After commencement of World War II, this provision was repealed.<sup>(3)</sup>

### ***Inducted Land Forces Limited to Western Hemisphere***

#### **§9.5 The House and Senate agreed to a provision restricting employment of inducted land forces beyond the limits of the Western Hemisphere in a conference report on the Selective Training and Service Act of 1940.**

On Sept. 14, 1940,<sup>(4)</sup> the House by a vote of yeas 233, nays 124,

1. See 86 CONG. REC. 11089, 76th Cong. 3d Sess., Aug. 28, 1940, for announcement in the Senate of Presidential approval.
2. This excerpt is taken from 54 Stat. 858, 859, 76th Cong. 3d Sess.
3. See 55 Stat. 799, 77th Cong. 1st Sess. (Pub. L. No. 77-338), approved Dec. 13, 1941.
4. 86 CONG. REC. 12207, 12227, 12228, 76th Cong. 3d Sess.

present 2, not voting 70, agreed to a conference report on S. 4164, the Selective Training and Service Act of 1940. This measure, passed as a conference report by the Senate on a vote of yeas 47, nays 25, on Sept. 14, 1940,<sup>(5)</sup> and signed by the President on Sept. 16, 1940, as Public Law No. 783,<sup>(6)</sup> contained the following restriction on use of inducted land forces:<sup>(7)</sup>

(e) Persons inducted into the land forces of the United States under this Act shall not be employed beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States, including the Philippine Islands.

After the commencement of World War II, this provision was repealed.<sup>(8)</sup>

5. *Id.* at pp. 12156-61.

6. See 86 CONG. REC. 12290, 76th Cong. 3d Sess., Sept. 19, 1940, for announcement in the Senate of Presidential approval.

7. This excerpt is taken from 54 Stat. 885, 886, 76th Cong. 3d Sess.

8. See 55 Stat. 799, 77th Cong. 1st Sess. (Pub. L. No. 77-338) approved Dec. 13, 1941. The House by a vote of 203 yeas, 202 nays, had agreed to H.J. Res. 222, extending the period of conscription beyond the 12 months established in the Selective Training and Service Act of 1940. 87 CONG. REC. 6995, 7074, 7075, 77th Cong. 1st Sess., Aug. 12, 1941.